TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 170

FINANCE AND GUARANTY COMPANY, PETITIONER,

vs.

HENRY W. OPPENHEIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1928

CERTIORARI GRANTED MARCH 7, 1928

(32,425)

(32,425)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 858

FINANCE AND GUARANTY COMPANY, PETITIONER,

vs.

HENRY W. OPPENHIMER, TRUSTEE IN BANKRUPTCY FOR W. A. LEE, TRADING AS NATIONAL MOTOR COMPANY, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

[Caption omitted]

At Law. No. 611

HENRY W. OPPENHEIMER, Trustee in Bankruptcy for W. A. Lee, Trading as National Motor Company, Bankrupt, Plaintiff,

vs.

FINANCE AND GUARANTY COMPANY, Defendant

BILL OF COMPLAINT—Filed December 15, 1922

To the Honorable Judge of [illegible] said Court:

Your complainant, Henry W. Oppenheimer, Trustee in Bankruptcy of W. A. Lee, trading as National Motor Com-
[fol. 2] pany, Bankrupt, respectfully shows unto the court the following case:

1. That on the 20th day of January, 1922, certain creditors filed a petition in this honorable court asking that W. A. Lee, trading at National Motor Company, be declared a bankrupt in accordance with the Acts of Congress in such cases made and provided, and that thereupon such proceedings were had that the said W. A. Lee, trading at National Motor Company, was, on the 25th day of February, 1922, duly adjudged a bankrupt, and your complainant thereafter was duly elected and qualified and gave bond as Trustee in Bankruptcy for said bankrupt, all of which appears more fully and at large from the official records of this honorable court;

2. That the said bankrupt was, for a period of time immediately preceding his bankruptcy, in the retail automobile business with his place of business and sales and show rooms at 1629 West Broad Street, in the City of Richmond, Virginia, and that at said place of business he kept in stock and offered for sale to the public certain automobiles,

among others four Velie Touring cars Nos. 114857, 116036, 115569, and 78197, which were part of the bankrupt's stock of merchandise and were on display and offered to the public for sale, and that the Finance and Guaranty Company, a body corporate or its agents, knew or should have known that said W. A. Lee, trading as National Motor Company, was fairly exposing and offering for sale to the general public the automobiles placed in his show room or sales room and more particularly the four Velie automobiles above mentioned.

3. On the 10th day of January, 1922, a time within the four months immediately preceding the adjudication in bankruptcy of said W. A. Lee, trading at National Motor Company, the Finance and Guaranty Company, a corporation chartered by and existing under the laws of the State of Delaware, a creditor of said bankrupt, filed in the Law and Equity Court of the City of Richmond, Virginia, a memorandum of an action of detinue, returnable to rules the third Monday in January, 1922, against the said W. A. Lee, [fol. 3] trading as National Motor Company, said action for detinue being for the recovery of the said four Velie automobiles, but so far as your complainant is informed and believes process in the said action has never been served on the defendant therein and the cause is still at rules, and on the same day, to wit, January 10, 1922, one W. O. Holmes, agent of said Finance and Guaranty Company, made oath before Luther Libby, Clerk of said Law and Equity Court, that there was good reason to believe the said defendant in said action of detinue insolvent so that any recovery against him for the alternate value of the property and for damages and costs would probably prove unavailing; that in accordance with the Statutes of Virginia in such cases made and provided the said Clerk of the said Court thereupon issued a process of seizure directing the Sheriff of the City of Richmond to take possession of the said automobiles and to deliver them to the said plaintiff in the said action; that thereupon the Sheriff of the City of Richmond, in accordance with said process, took possession of said four Velie automobiles and delivered them to the said W. O. Holmes, as agent for said Finance and Guaranty Company. Certified copies of which said proceedings in said action of

detinue are herewith filed marked "Exhibit A," and asked to be read as a part of this bill of complaint. Your complainant avers and charges that the said Finance and Guaranty Company still has the said four automobiles or else has disposed of them, and your complainant avers that he has made demand upon said Finance and Guaranty Company that it deliver to him the said four automobiles, which has been and still is refused.

4. Your complainant does not know whether said Finance and Guaranty Company had any deed of trust, chattel mortgage, reservation of title, or other supposed lien on said four Velie automobiles. He has made diligent search and has been unable to find that any such lien was recorded in the Clerk's Office of the Chancery Court of Richmond, Virginia, such being the office in which such instruments are required by law to be recorded in the City of Richmond, and your complainant charges that no such supposed lien was recorded. Your complainant is advised, however, and so charges that he is entitled to recover the said four Velie automobiles or their alternate value regardless of whether [fol. 4] there was any such lien and regardless of whether it was recorded, if any such there was.

5. Your complainant charges that at the time when the said Finance and Guaranty Company so took possession of the said four Velie automobiles, the said bankrupt was insolvent and so continued up to the time of his adjudication.

6. Your complainant charges that the effect of allowing the said Finance and Guaranty Company to retain the said four Velie automobiles will be to enable it to obtain a greater percentage of its debt than other creditors of the same class.

7. Your complainant further specifically charges that the said Finance and Guaranty Company, a person corporate, or its agents acting therefor, had at the time it so took possession of said four Velie automobiles, reasonable cause to believe that the said W. A. Lee, trading as National Motor Company, was insolvent and that a preference would thereby be effected, and your complainant further charges that the said taking possession of said automobiles is a voidable

preference in bankruptcy as defined and set forth in the Bankruptcy Act of 1898 as adopted by Congress, and the amendments thereto, and that your complainant is entitled to recover the said four automobiles or their alternate value.

In consideration whereof and forasmuch as your complainant is without remedy save in a court of equity where alone matters of this kind are properly cognizable, your complainant prays that the Finance and Guaranty Company, a corporation, be made a party defendant hereto and required to answer the same, but not under oath, answer under oath being hereby expressly waived; that the said taking possession of the said four Velie automobiles by said defendant may be adjudged a voidable preference in bankruptcy, and that the said Finance and Guaranty Company be required to turn over to your Trustee the said four Velie automobiles or to account to him for the money value thereof; that all proper orders and decrees issue and accounts be taken, and that your complainant may have such other, further and more general relief as the nature [fol. 5] of his case may require or to equity shall seem meet.

And your complainant will ever pray, etc.

(Signed) Henry W. Oppenhimer, Trustee in Bankruptcy for W. A. Lee, Trading as National Motor Company, Bankrupt. Jos. M. Hurt, Jr., Counsel.

Duly sworn to by Henry W. Oppenhimer. Jurat omitted in printing.

[fol. 6] "Exhibit A" to Bill of Complaint

Virginia:

In the Law and Equity Court of the City of Richmond

Finance and Guaranty Company, a Corporation Chartered and Existing under the Laws of the State of Delaware,

vs.

W. A. Lee, Trading as National Motor Company

The clerk will please issue process against the above named defendant to answer an action in detinue for four

(4) Velie Touring Cars, numbered as follows: 114857, of value of $1,000., 116036, of value of $1,000.00, 115569 of value of $1,000., and 78197, of value of $1,000., all of the aggregate value of $4,000.00.

Damages $4,000.00. Returnable to Rules the third Monday in January, 1922.

Chas. W. Crowder, p. q.

A copy teste: (Signed) Luther Libby, Clerk.

VIRGINIA:

In the Clerk's Office of the Law and Equity Court of the City of Richmond, January 19th, 1922

FINANCE AND GUARANTY COMPANY, a Corporation Chartered and Existing under the Laws of the State of Delaware, Plaintiff,

against

W. A. Lee, Trading as National Motor Company, Defendant

[fol. 7] This day personally appeared before me, Luther Libby, Clerk of the Law and Equity Court of the City of Richmond, in my office W. O. Holmes, who being duly sworn, made oath that there is good reason to believe that the defendant is insolvent, so that any recovery against him for the alternate value of the property and for damages and costs will probably prove unavailing, and that such property will be destroyed or materially damaged or injured by neglect, abuse or otherwise if permitted to remain longer in possession of the defendant or other person claiming under him that said property, to wit: four (4) Velie Touring Cars, numbered as follows: 114,857 of value of $1,000; 116,036 of value of $1,000.00; 115,569 of value of $1,000 and 78197 of value of $1,000, all of the aggregate value of $4,000.00 and that the said plaintiff is entitled to recover the same.

Given under my hand this 19th day of January, 1922.

Luther Libby, Clerk

A copy—Teste: (Sgd.) Luther Libby, Clerk.

Commonwealth of Virginia to the Sheriff of the City of Richmond, Greeting:

We command you to summon W. A. Lee, trading as National Motor Company, to appear at the Clerk's Office of our Law and Equity Court of the City of Richmond, at the Courthouse of the said City, at the Rules to be holden for said Court on the Third Monday in January, 1922, to answer the action of Finance and Guaranty Company, a corporation chartered and existing under the laws of the State of Delaware, of a plea of detinue for Four (4) Velie Touring Cars numbered as follows: 114,857, of value of [fol. 8] $1,000; 116,036, of value of $1,000; 115,569 of value of $1,000, and 78,197, of value of $1,000, all of the aggregate value of $4,000.00.

Damages, Four Thousand Dollars.

And have then there this writ.

Witness Luther Libby, Clerk of our said Court, at Richmond, this 10th day of January, 1922, and in the 146th year of the Commonwealth.

A Copy. Teste:

Luther Libby, Clerk.

Not found, whereabouts unknown to me.

J. Herbert Mercer, Sheriff of the City of Richmond, Va.

A Copy Teste: (Sgd.) Luther Libby, Clerk.

The Commonwealth of Virginia to the Sheriff of the City of Richmond, Greeting:

Whereas since the institution of an action of detinue in our Law and Equity Court of the City of Richmond, brought by Finance and Guaranty Company, a corporation, against W. A. Lee, trading as National Motor Company, to recover Four (4) Velie Touring Cars numbered as follows: 114,857, of value of $1,000.00, 116,036, of value of $1,000; 115,569, of value of $1,000.00 and 78,197 of value of $1,000, all of the aggregate value of $4,000.00 there has been filed in the Clerk's Office of our said Court an affidavit that the action is to recover the property above described of the said aggregate value as aforesaid, and that the affiant verily believes that the plaintiff is entitled to recover the same.

[fol. 9] Therefore we command you that you seize and take into possession the said property above mentioned and described in said affidavit, and deliver the same to the plaintiff. And that you make return hereof at the Rules to be held in the Clerk's Office of said Court on the Third Monday in January, 1922.

And have then there this writ.

Witness Luther Libby, Clerk of our said Court at Richmond, Va., this 10th day of January, 1922. And in the 146th year of the Commonwealth.

Luther Libby, Clerk.

A copy. Teste: (Sgd.) Luther Libby, Clerk.

Received of J. Herbert Mercer, Sheriff of City of Richmond, Va., the within described automobiles, to wit: One Velie Automobile 114,857—One Velie 116,936—One Velie 115,569—One Velie 78197—total of Four Velie Automobiles, Richmond, Va., Jany. 10, 1921.

The said cars taken under within process and delivered to plaintiff as herein directed.

Finance & Guaranty Co., per W. O. Holmes, Special Representative.

Executed in the — of Richmond, Va., Jany. 10, 1922, by seizing and taking in possession each of within described automobiles and delivering each of said automobiles to said Plaintiff as shown by receipt above endorsed.

J. Herbert Mercer, Sheriff of the City of Richmond, Va., by J. C. Crump, Deputy Sheriff.

$6.00.

A copy—teste: Luther Libby, Clerk.

[fol. 10] In United States District Court

Motion to Dismiss—Filed January 4th, 1923

And now comes the defendant and moves that the bill be dismissed for the following reasons:

1

That it appears from the prayer of the bill of complaint that the relief sought is the recovery of four certain auto-

mobiles, or the money value thereof, because, it is alleged by the said bill of complaint, that said automobiles were delivered by the alleged bankrupt to the defendant under such circumstances as constituted a voidable preference under the bankruptcy act.

2

That there are no facts alleged in said bill which justify equity jurisdiction, because the complainant has a full, complete and adequate remedy at law, in that if the said plaintiff be entitled to recover at all, full recovery could be had and full relief obtained by an action of detinue on the law side of the Court.

Wherefore, the defendant moves that the bill of complaint be dismissed, agreeable to Equity Rule 29, of the Supreme Court of the United States.

Finance & Guaranty Company, by (Sgd.) S. M. Brandt, Counsel. (Sgd.) S. M. Brandt, Solicitor for Finance & Guaranty Company.

In United States District Court

Motion to Transfer Cause to Law Side of Court—Filed January 4th, 1923

And now comes the defendant and moves that this cause [fol. 11] be transferred to the Law side of this Court, and there proceeded with, for the reasons following:

That it appears from the prayer of the bill of complaint that the relief sought is recovery of the property alleged to have been delivered to this defendant, or the money value thereof, and that if the plaintiff is entitled to recover he has a full, complete and adequate remedy at law by action of detinue, and that the said bill for this reason is without equity.

Wherefore, the defendant moves that this cause be ordered transferred to the law side of this Court and the plaintiff be ordered to amend his bill accordingly, and that such other orders as to costs or otherwise may be made

as to the Court may seem proper, in accordance with Equity Rule No. 22, as promulgated by the Supreme Court of the United States.

Finance & Guaranty Company, by (Sgd.) S. M. Brandt, Counsel. (Sgd.) S. M. Brandt, Solicitor for Finance & Guaranty Company.

In United States District Court

[Title omitted]

Order Transferring Cause to Law Side of Court—Filed May 25, 1923

This cause came on to be heard on motion of the defendant to transfer it to the law side of the court and was ar-[fol. 12] gued by counsel. Upon consideration thereof, it appearing that the suit should have been brought as an action on the law side of the court,

It is ordered, adjudged and decreed that it be transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential to the determination of the issues presented.

D. Lawrence Groner, United States District Judge.

May 25th, 1923.

In United States District Court

[Title omitted]

Order Directing Defendant to File Grounds of Defense—Filed October 2, 1923

It is ordered that the Defendant herein do, within five (5) days from the entry of this order, file its grounds of defense herein.

(Sgd.) Groner, Judge.

Oct. 2, 1923.

[fol. 13] IN UNITED STATES DISTRICT COURT

LETTER TO COUNSEL CONTAINING CONCLUSIONS OF THE COURT —Filed November 15, 1923

November 13th, 1923.

Mr. Joseph M. Hurt, Jr., 1111 East Main Street, Richmond, Va., and S. M. Brandt, Seaboard Bank Building, Norfolk, Va.

DEAR SIRS: I have carefully considered the evidence and the arguments of counsel in this case. Lack of time prevents anything more than a brief expression of my views.

It sufficiently appears from the evidence that the bankrupt executed a conditional sale agreement for the automobiles in question; that by this agreement title to the cars was reserved to the Finance Guaranty Company, and that the agreement was duly admitted to record in accordance with the existing Virginia statute on that subject. It has been frequently held that such an agreement is valid, and that the reservation of title is good as against a trustee in bankruptcy. Prior to the Bankruptcy Act of June 25th, 1910, by which the Trustee was given the status of a lien creditor or a judgment creditor, dependent upon whether the property came into the possession of the bankruptcy court or not, it was held that the holder of a conditional sale contract, even when unrecorded, had a better title to the property than the trustee; York Mfg. Co. vs. Cassell, 201 U. S. 344; Holt vs. Henley, Trustee, 232 U. S. 637. In the last named case, which arose just after the amendment of 1910, but in which the lien was taken prior to the effective date of the amendment, the Supreme Court held:

"His continuing title simply was postponed to purchasers without notice and creditors getting a lien."

[fol. 14] After the passage of the amendment referred to, the rights of the trustee were held to be superior to those of the holder of an unrecorded reserved title lien or conditional sale contract, wherever the property involved came into possession, by virtue of the bankruptcy, of the bankrupt court; and in Big Four Implement Company vs. Wright (C. C. A., 8th Circuit) 207 Fed. 535, it was held that the lien conferred on the trustee by the amendment of 1910

dated as of the time of the commencement of the bankruptcy proceeding. In Rock Island Plow Company vs. Reardon, Trustee, 222 U. S. 354, the holder of an unrecorded lien had taken possession of the property covered by it before the bankruptcy. It was conceded in that case that such action would have been good against the trustee in bankruptcy but for the fact that prior to the taking possession another creditor had secured a lien by execution, which lien was preserved by the trustee for the benefit of the creditors. Passing on another case in which the facts were nearly identical with this, Industrial Corporation vs. Cappleman, Trustee, (decided Oct. 21st, 1922) the Circuit Court of Appeals for this Circuit said:

"When a state recording statute, as construed by the state court, only provides for protection against unrecorded instruments of 'lien creditors' . . . . etc., it has been held that the trustee cannot recover the property when the holder of an unrecorded mortgage or other instrument requiring record acquires possession before the filing of the petition in bankruptcy."

It would seem, therefore, perfectly clear that, unless the so-called "Traders' Act" makes a contract of the kind in question void ab initio, and therefore invalid even as between the parties, the rule above announced would apply, and the title of the Finance & Guaranty Company held to be superior to that of the trustee. I do not think that any authority can be produced to sustain the position that such a contract is void abinitio. An automobile is, in itself, sufficiently distinctive and susceptible of identification to be made the subject of a reserved title contract or even of a mortgage. It is true it has been held by the Court of Appeals of Virginia, in Boice vs. Finance, etc., Corporation, 127 Va. 563, that such a contract is void as against the pur-[fol. 15] chaser of an automobile kept by a retail dealer for sale, and exhibited for sale in his store or salesroom. This decision, however, was predicated not upon the Traders' Act, but upon the so called "shifting stock of goods doctrine," which has obtained in Virginia for more than fifty years. There is nothing in the opinion in this case to suggest that such a contract is not good as between the parties, or that it is not good as against the world, except where the holder of the lien allows the property to be exhibited for

sale in a public salesroom. The Traders' Act, Sec. 5224 of the Code of Virginia 1919, has been construed by the Court of Appeals of Virginia in several cases, notably Hoge, etc., vs. Turner, 96 Va. 624; Edmunds, etc., Trustees, vs. Hobbie, 97 Va. 588, and Partlow vs. Lickliter, 100 Va. 631. In the last named case the Court, in speaking of the Section, says:

"It is found in an independent chapter which deals with a restricted class—partners, partnership associations, factors, agents, and traders—and was passed in the interest of trade and commerce. It operates chiefly upon shifting stocks of goods, wares, and merchandise, bought for the express purpose of daily indiscriminate sale, and constantly changing hands, property difficult of accurate description, and impossible of continued identification, through the medium of the registry laws. To undertake to apply those laws to that class of citizens, and to that species of property, if their enforcement were practicable, would operate as an embargo on trade."

While it may be admitted that the bankrupt in this case would probably come under the description "trader," it is certainly true that an automobile is neither "difficult of accurate description," nor "impossible of continued identification;" but beyond all of this, it seems to me perfectly clear that the statute was designed to prevent a person engaged in trade from operating under a fictitious name, and in such case to make the property of his principal liable for his debts. The statute itself, after describing the different classes of traders, says that if such person "fail to disclose the name of his principal or partner by a sign," * * * etc., "all the property," * * * etc., [fol. 16] "used in such business shall, as to the creditors of any such person, be liable for the debts of such person." In this case the Finance & Guaranty Company did not occupy the relation of principal to the bankrupt. Its true relation was that of vendor. It acquired title to the property from the manufacturer, by the payment of the draft sent with the bill of lading for the cars, and delivered the same to the bankrupt, reserving title until the payment of the debt. In the Lickliter case the precise relation of Partlow, the bill of sale creditor, to Lickliter does not ap-

pear, but I think it does sufficiently appear that Partlow was a partner, or a principal, in the business, because it is there shown that prior to the occurrences out of which the issue in that case arose she had obtained an injunction restraining Lickliter from collecting the accounts of the business or from interfering with the property or the business in question. Nor do I think, irrespective of the above, that the case is conclusive of the facts shown to exist in the case at bar, namely, the repossession of the property before the right of any creditor armed with judical process existed. The word "creditors" used in the statute did not include simple creditors, but only creditors by judgment or lien. There were none such at the time of the repossession of the property in this case, and the trustee's right, under the amendment of 1910 to the bankruptcy law, as a judgment creditor became effective only as of the date of the commencement of the proceeding in bankruptcy, some ten days or two weeks after the property was removed from the bankrupt's premises. There is nothing, in my opinion, in the case of Chesapeake Shoe Company vs. Seldner, 122 Fed. 593, or in that of Virginia Book Company vs. Sites, 254 Fed. 46, to the contrary.

In the Chesapeake Shoe Company case, supra, Small, the bankrupt, was a shoe dealer, to whom the Chesapeake Company had sent a consignment of shoes, which were contained in his stock, and which, as their agent, he was authorized to sell and remit to them, after the deduction of his commissions. They were found by the trustee when he took possession.

In the Sites case, the conditions were the same, except that a day or two before the bankruptcy the book company removed its books.

In both cases the relation of principal and agent existed, and in neither case was the property itself, per se, subject [fol. 17] to recordation by proper description, etc., as required by the recordation statute.

It appears, however, from the evidence that at the time the property was taken, under judical process issuing out of the state court, one or more of the cars had been equipped with extras costing several hundred dollars. These extras were not covered by the reserved title contract and should not have been taken, and the Finance & Guaranty Company

is, of course, liable for their value as shown by the evidence. It also appears, from the return of the officer making the levy, that two of the cars which were removed were of different numbers from those described in the reserved title contract. The evidence tended to show that this was an error on the part of counsel who prepared the seizure papers and made the return of the officer. The officer himself, however, testifies that the numbers on the cars corresponded with the numbers in the writ. It goes without saying that if the property taken did not fit the description of the property the title to which was reserved, the seizure was unlawful. It is equally true that if the seizure papers and the writ were inadvertently made out incorrectly, this should not militate against the interest of the title holder. To the end that this question may be decided, and particularly in view of the statement of counsel that the cars are still in the possession of the Finance & Guaranty Company, I suggest that the trustee in bankruptcy appoint a representative to inspect the cars and compare them with the original reserved title contract, and if it appears that they are the same, no further point will be made of this matter. However, if it appears otherwise, or if the Finance & Guaranty Company is unable to prove the identity of the cars with the description of the property reserved in the agreement, a decree will be entered against them for the value of the two cars in question.

Yours very truly, (Signed) D. Lawrence Groner, by G. T. D. D. Lawrence Groner, United States District Judge.

Copy to clerk, with papers.

[fol. 18] In United States District Court

[Title omitted]

Judgment and Order Settling Bill of Exceptions—Filed October 16, 1924

This day came the parties in the above action, by their attorneys, and by agreement of parties, trial by jury was

waived, and all matters of law and fact are submitted to the Court, and the Court having fully heard the evidence, doth consider that the plaintiff recover of the defendant the sum of $700.00 and one half of his costs herein, and no more, to which action of the Court the plaintiff, by Counsel, duly excepted, and thereupon tendered his certificate and bill of exceptions, which being examined and found correct, is signed, sealed, and made a part of the record.

(Signed) D. Lawrence Groner, Judge.

Oct. 16, 1924.

[fol. 19] In United States District Court

Order Directing Entry of Judgment—Filed July 3, 1924

Mr. S. M. Brandt, Seaboard Bank Building, Norfolk, Virginia, and Mr. Joseph M. Hurt, Jr., Travelers Building, Richmond, Virginia.

Dear Sirs: I have considered the letters of counsel in the above matter, and my conclusion is that the designation of the cars was sufficient.

The claim for extra equipment, I think should be allowed. This extra equipment, according to the evidence, was all placed on the cars after the conditional sales contracts were executed and recorded. The amount which is chargeable to this item is stated in the evidence at from $700.00 to $1,000.00. It was not itemized and it is doubtful whether the amount is exactly correct, and yet it is all the evidence that was before me on the subject. The case was regularly tried and I know of no good reason to re-open it and retry this question. The Clerk will, therefore, enter judgment for the plaintiff for seven hundred dollars ($700.00) and costs divided.

Yours very truly, D. L. G. D. Lawrence Groner, United States District Judge.

Copy to Mr. Joseph P. Brady, Clerk, Richmond, Va.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING WRIT OF ERROR—Filed October 16, 1924

On this 16th day of October, 1924, came Henry W. Oppenhimer, Trustee in Bankruptcy for W. A. Lee, trading as National Motor Company, Bankrupt, by Joseph M. Hurt, Jr., his attorney, and filed herein and presented to the Court his petition praying for the allowance of a writ of error to the judgment entered herein on the 16th day of October, 1924, together with his assignment of errors intended to be urged by him, and praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error.

(Signed) Groner, Judge.

[fol. 21] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2323

HENRY W. OPPENHIMER, Trustee in Bankruptcy for W. A. Lee, Trading as National Motor Company, Bankrupt, Plaintiff in Error,

versus

FINANCE AND GUARANTY COMPANY, Defendant in Error

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond

In Bankruptcy

Argued January 27, 1925. Decided May 4, 1925

Before Woods, Waddill, and Rose, Circuit Judges

Joseph M. Hurt, Jr., for plaintiff in error and S. M. Brandt for defendant in error.

Opinion—Filed in District Court October 29, 1925

[fol. 22] Rose, Circuit Judge:

The parties below occupied the same position they do in this Court; that is to say, Henry W. Oppenhimer, as Trustee in Bankruptcy for one W. A. Lee, trading as the National Motor Company, was there plaintiff and is plaintiff in error here, and the Finance and Guaranty Company, defendant in error here was defendant there. For brevity they will be referred to as the Trustee and the Vendor, respectively.

The bankrupt, one W. A. Lee, traded as the National Motor Company. No one else was interested in the business which was that of buying and selling automobiles. The Vendor financed the purchase of automobiles for Lee and was the vendor of the cars to him. The sale was made on the installment plan and by the agreements between the parties, which were duly recorded, the legal and equitable title to the automobiles was to remain in the Vendor until the final payment of the last installment of the purchase money and the performance by the bankrupt of the other terms of the agreement. These contracts contained other provisions, such as that the bankrupt could not mortgage, rent, pawn, dispose of, or sell, the property, without the permission of the Vendor, first obtained in writing. There is no question, however, that the bankrupt bought the automobiles to sell again and that the Vendor was at all times aware of this intention. The agreements, all substantially identical in form, bore date at various times from the 28th of April, 1921, to the 6th of August, in the same year.

On the 26th of December, 1921, Lee left Richmond, for parts unknown and so far as the record discloses, has not been heard of since. On the 10th of January, the Vendor instituted suit in detinue in the law and equity Court of the City of Richmond and in the initial affidavit, its duly authorized agents swore that there was good reason to believe that Lee was insolvent. In execution of the writ issued in the case, the sheriff of Richmond on the same day seized the automobiles and delivered them to the Vendor. Ten days later, on the 20th of January, an involuntary petition

in bankruptcy was filed against Lee and he was on the 25th of February adjudicated a bankrupt.

On the 15th of December, 1922, the Trustee filed a peti [fol. 23] tion in the instant proceeding against the Vendor alleging that the taking and possession by it of the four automobiles in question amounted to avoidable preference and praying an order for the return of the automobiles or the payment of the money value thereof. After hearing testimony, the learned Court below was of the opinion that the Vendor had acted within its rights and accordingly dismissed the petition.

The rights of the Trustee, if he has any, depend upon the so-called Traders' Act of Virginia, Section 5224, Code of 1919, which has been considered by this Court in the Chesapeake Shoe Co. vs. Soldner 122 Fed. 593 and in the Virginia Book Co. vs. Sites 254 Fed. 46, and in other cases. It has many times been construed by the highest Court of Virginia, as for example in Hoge vs. Turner 96 Va. 624, Edmunds vs. Hobbie Piano Co. 97 Va., 583, Partlow vs. Lickliter 100 Va. 631, Boice vs. Finance & Guaranty Co. 127 Va. 563, Nusbaum vs. City Bank & Trust Co. 132 Va. 54, Capitol Motor Corporation vs. Lasker 138 Va. 630. By these decisions, it is clearly settled—First, that the statute applies to a trader doing business in his own name under a general merchant's license whenever the goods of another are put in his possession with the intent on the part of the other that such goods shall form part of his ordinary stock of merchandise and be exposed for sale as such, without any notice being given on the premises that they are not the goods of the trader. Edmunds vs. Hobbie Piano Co. 97 Va. 588. Second, under such circumstances the goods are liable for the trader's debts, although the creditor seeking to hold them has actual knowledge of the circumstances under which they came into the trader's possession. Hoge vs. Turner 96 Va. 624. Third, that it makes no difference that the agreement between the merchant and the person entrusting the goods to him was in writing and was recorded. Boice vs. Finance & Guaranty Co. 127 Va. 563, Partlow vs. Lickliter 100 Va. 631. This third proposition seems to be the logical result of the second. Fourth, that the statute applies to automobiles and other bulky and valuable articles, susceptible of easy identification as well as to smaller ar

ticles exposed for sale by a dealer. Boice vs. Finance & Guaranty Co. 127 Va. 523, Nusbaum vs. City Bank & Trust Co. 132 Va. 54, Capital Motor Corporation vs. Lasker 138 [fol. 24] Va. 630. The first of the cases cited has reference to a dealer in automobiles who, from the street numbers, appears to have occupied the store next — that of the bankrupt in this case. Fifth, that goods in the possession of a merchant under the circumstances above stated are quoad his creditors his property. Nusbaum vs. City Bank & Trust Co. 132 Va. 54. Sixth, that where the vendor or owner of the goods entrusted to the merchant repossesses himself of them within four months before filing of the petition in bankruptcy, having good reason at the time to believe that his debtor is insolvent and that by repossessing himself he will obtain a payment of a larger proportion of his debt or what would have been his debt had he not so repossessed himself, than will be obtained by other creditors, he has secured a voidable preference and is answerable to the trustee therefor. Virginia Book Co. vs. Sites 254 Fed. 46. Seventh, that the title of a trustee under a conventional deed of trust or assignment for the benefit of creditors, does not antedate his deed and that the vendor has good title against such trustee and creditors represented by him of property of which he has so repossessed himself before the delivery of the deed of assignment. Capital Motor Corporation vs. Lasker 138 Va. 63.

These propositions are decisive of the case. The fact that in Capital Motor Corporation vs. Lasker 138 Va. 630, it was properly held that a trustee under a conventional assignment or a deed of trust for the benefit of creditors has no rights as against property of which the vendor or lienor repossessed himself before the delivery of the deed of trust or assignment, is in no wise in conflict with the law as it has been above stated. A conventional trustee has no power to vacate preferences.

It follows that the trustee in bankruptcy in this case was entitled to the relief for which he asked.

Reversed.

In United States Circuit Court of Appeals

Dissenting Opinion

Waddill, Circuit Judge, dissenting:

The appellee was the holder of a duly recorded conditional sales agreement covering the automobiles the subject of this appeal. Ten days prior to the filing of the petition in bankruptcy, it repossessed itself of the automobiles by a proceeding in a State court of competent jurisdiction, and was so in possession at the time of the bankruptcy. [fol. 25]

Under these conditions, I can but believe that appellee acquired title superior to that of the trustee in bankruptcy, whose status as a lienor under Section 47-A, Bankr. Act, 1910, became effective as of the date of filing the petition in bankruptcy. Martin v. Commercial Nat. Bank, 245 U. S. 513, 517; Fairbanks Shovel Co. vs. Wills, 240 U. S. 642, 649; Bailey v. Baker Ice Machine Co. 239 U. S. 268, 276; Woods v. Stemple, Rt. (C. C. A. 4th cir.) 289 Fed. 238; Capitol Motor Corporation v. Lasker, 138 Va. 630; Nusbaum v. City Bank, 132 Va. 54, 57.

In Virginia, it is well settled that "creditors" within the purview of the act in question here, means "lien creditors," that is, persons who have liens upon the property; and whatever may be the status of the trustee in bankruptcy in the enforcement of the rights of those who have such liens—that is to say, whether the title of such trustee in bankruptcy as to such lien creditors may relate back to a date ante dating the time of his appointment for the purpose of enforcing such liens, still, insofar as he represents the unsecured creditors, those having no fixed lien, his status as trustee cannot relate back prior to the time of the filing of the petition in bankruptcy in the proceeding in which he was appointed, so as to enable unsecured creditors to defeat the rights of vendors or lienors who have established their claims and liens.

True copy; Teste:

(Sgd.) Claude M. Dean, Clerk U. S. Circuit Court of Appeals, 4th Ct., by ——— ———, Deputy Clerk.

(Seal of Circuit Court.)

[fol. 26] UNITED STATES CIRCUIT COURT OF APPEALS

MANDATE—Filed in District Court October 29, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judge of the District Court of the United States for the Eastern District of Virginia, Greeting:

Whereas, lately in the District Court of the United States for the Eastern District of Virginia, before you or some of you, in a cause between Henry W. Oppenhimer, Trustee in Bankruptcy for W. A. Lee, trading as National Motor Company, Bankrupt, Plaintiff, and Finance and Guaranty Company, Defendant; wherein the judgment of the said District Court entered in the said cause on the 16th day of October, 1924, is in the words following, to wit:

"This day came the parties in the above action, by their attorneys, and by agreement of parties, trial by jury was waived, and all matters of law and fact are submitted to the Court, and the Court having fully heard the evidence, doth consider that the plaintiff recover of the defendant the sum of $700.00 and one-half of his costs herein, and no more." * * *

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Fourth Circuit by virtue of the writ of error sued out by the said Henry W. Oppenhimer, Trustee in Bankruptcy for W. A. Lee, trading as National Motor Company, Bankrupt, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the term of January, in the year of our Lord one thousand nine hundred and twenty five the said [fol. 27] cause came on to be heard before the said United States Circuit Court of Appeals for the Fourth Circuit, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the

Eastern District of Virginia, at Richmond, with directions to set aside the verdict and grant a new trial in accordance with the opinion of this Court.

John C. Rose, U. S. Circuit Judge.

May 5, 1925.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the opinion and the judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the twenty eighth day of October, in the year of our Lord one thousand nine hundred and twenty-five.

Claude M. Dean, Clerk of the U. S. Circuit Court of Appeals for the Fourth Circuit.

Costs of pltff. in error:

Clerk	$36 45
Printing Record	51 75
Supervising fee	11 25
Attorney	20 00
	$119 45

[fol. 28] Mandate. Richmond, Va., June 2, 1925, mandate stayed pending petition of defendant in error for rehearing. October 20, 1925, rehearing denied. Received and filed October 29th, 1925. (Sgd.) C. K. Moran, Deputy Clerk.

In United States District Court

[Title omitted]

[fol. 29] Judgment—Filed January 15, 1926

This day came again the parties in the above action, by their attorneys, and by agreement of parties trial by jury was waived, and all matters of law and fact were submit-

ted to the Court, and the Court having fully heard the evidence, doth consider that the plaintiff have and recover of the defendant the sum of $4,190.99, with lawful interest thereon from 15 Dec. 1922 until paid, together with his costs in this behalf expended. To which action of the Court the defendant by counsel excepted.

(Signed) D. L. G., Judge.

Jan. 14, 1926.

In United States District Court

[Title omitted]

Order Filing Bill of Exceptions—Filed February 20, 1926

This day came Finance and Guaranty Company by Counsel, and presented its Bill of Exceptions taken to various actions and rulings of the Court during the trial of this case and the same were signed, sealed and enrolled and ordered to be made a part of the Record in this case.

D. Lawrence Groner, United States District Judge.

Feb. 20, 1926.

In United States District Court

Bill of Exceptions—Filed February 20, 1926

Caption

Be it remembered that upon the trial of the above entitled action, neither party required a jury, and the whole matter [fol. 30] of law and fact was submitted to the Court under a stipulation in writing signed by counsel for the respective parties and filed with the papers in the cause. The stipulation in writing heretofore entered into between the parties waiving jury and submitting all questions of law and fact to the court is renewed to the same extent as if the same were herein specifically filed.

And thereupon the plaintiff, to maintain the issue on his part, introduced the following witnesses, all of whom were duly sworn, and testified as follows:

HENRY W. OPPENHIMER

Witness testified that he is Trustee in Bankruptcy of W. A. Lee, trading as National Motor Company, Bankrupt, having been appointed as such on March 22, 1920, the involuntary petition in bankruptcy having been filed on January 29, 1922; that soon after his appointment he went to the place of business of the bankrupt, which was locked up, getting the keys from the bankrupt's attorneys; said place of business bore the sign "National Motor Company"; he did not remember seeing any other signs and thought he would have remembered them had there been; after his appointment he ascertained that Bankrupt was insolvent; that Lee was not in possession of the automobiles sued for at the time petition was filed.

MRS. W. A. LEE

Witness testified that she is the wife of the Bankrupt, who had a place of business at 1629 West Broad Street, Richmond, Virginia, and did business under the trade name of National Motor Company, being sole owner of said unincorporated business, and which consisted of buying and selling Velie automobiles; that she worked there and kept his books and did his stenographic work and knew more about the business than her husband did; that her husband left town on December 26, 1921, and she had not heard from him since, and his place of business was shut up by him before he left town and not opened again for the conduct of [fol. 31] business until the officers entered it for the purpose of taking the cars; that at the time he left there were in the salesroom four new Velie automobiles and two second hand cars, and that Mr. W. R. Payne, a representative of the defendant, had previously been in the salesroom and had seen the Velie automobiles in there; that after he left she on one occasion went into the place of business with Mr. Wyatt, High Constable of the City of Richmond, who

levied she thought one a model 48 and three model 34, the 34's selling at the News Leader, the Velie cars at that time being also in there; that there was no sign posted which would indicate that the cars were not the property of the bankrupt nor was there any notice thereof given in the newspapers; that the four Velie cars were touring cars, one a model 48 and three model 34, the 34's selling at around $1,385.00 f. o. b. factory, and the 48 at between $1,500.00 and $1,800.00 f. o. b. factory, this being the price without extra equipment, such being the condition of the cars when the liens of defendant were put on the cars; that afterwards the model 48 was fully equipped with every extra equipment that could be put on an automobile and the other cars had extra equipment such as bumpers and pilot lights, and that the value of the extra equipment was between $800.00 and $1,000.00; that she was not certain of the nature of the lien which the defendant had on the cars; that the defendant kept in close touch with the bankrupt's condition and his representative had been there about a month prior to the time when he left, and had been pressing bankrupt for payment, and said they must have their money.

J. C. Crump

Witness testified that in January, 1922, he was Deputy Sheriff of the City of Richmond, Virginia, that he received a process of seizure from the Law and Equity Court of that City, a copy of which is filed with the Bill of Complaint, directing him to take possession of the four Velie automobiles mentioned in said process of seizure; that pursuant to said process on January 10th, 1924, he went to the place of business of the Bankrupt, at 1629 West Broad [fol. 32] Street, in Richmond, Virginia, along with a representative of the defendant, who pointed the automobiles out to him, that he found the place locked, dusty, and appearances indicated that it had been closed for a week or ten days; that he compared the numbers on the cars with the numbers on the process of seizure and took possession of the four automobiles and turned them over to the repre-

sentative of the defendant, taking from him a receipt, copy of which is filed with the Bill of Complaint, said representative giving an indemnifying bond for $8,000.00; that he did not notice any sign in the place indicating that the cars were not the property of the National Motor Company.

At the close of the foregoing testimony for the plaintiff, the defendant moved the Court to render a verdict for it, the defendant, but the Court overruled said motion, to which action of the Court the defendant, at the time of said ruling, excepted.

And thereupon the Defendant introduced the following witnesses all of whom were duly sworn, and testified as follows:

WILSON R. PAYNE

Witness testified that he is Superintendent of the Motor Department of the defendant, Finance and Guaranty Company, which position he has held for three years; that he was Special Representative of the Finance and Guaranty Company in April, 1921, which position he held in August, 1921; that it was necessary for him to be familiar with the cost price and market value of various makes of automobiles, including the Studebaker, Velie and Buick; that he was familiar with Velie cars for the reason that his Company was then financing one of the largest dealers of the City of Baltimore, the Sykes Auto Company, whose place of business he had occasion to visit two or three times a week and in connection with this financing, it came under his Department to dispose of slightly used cars; that the cars which are the subject of this litigation were sold to the National Motor Company on the 28th day of April, 1921, [fol. 33] by his Company under conditional sales contracts which are in evidence, one of which said contracts is dated April 28, 1921, known as Exhibit "B" and one of which said contracts is dated the 6th day of August, 1921, known as Exhibit "C," which said contracts covered the Velie automobiles which are the subject of this suit; that said automobiles were new cars at the time of their delivery; that according to the evidence heretofore introduced

in this case at the previous trial had thereof, these cars were sued for on the 10th day of January, 1922, and seized in an action of detinue instituted in the Court of Law and Equity of the City of Richmond; that at the time of their seizure, he knew of their quality and mechanical condition because he had had occasion to come to Richmond several times to audit these cars and was in a particularly good position or fair position to judge as to the treatment they were reported to be getting while here in Mr. Lee's custody; that he remembers distinctly one morning he came to audit the cars after they had become overdue and Mr. Lee had asked him to hold off. He never questioned our title to the cars but one of the cars was coming up Broad Street with a tow line attached and great big heavy touring car being towed by this brand new floor car, and he explained to me they had rebored the motor and put new piston rings in and it was impossible for a man to crank it and they were towing it with this car to ease it up so it would run, using their new car for towing this old one which he did not like and told Mr. Lee that he was very much disappointed in the way the cars were treated. Several times later when he came down he found that the cars were out and that persons were using them and he simply said this to show the depreciation on the cars and *it* remembers distinctly that the car he saw towing was the car that had the extra equipment, which consisted of a nickel radiator, nickel bumper, spot light, parking light and extra heavy special headlights nickel; that the cost of the extra equipment, based upon having replaced parts of that character, was at least $125.00. The headlights are expensive and when these cars came back to Baltimore, he had to put a new rear end into the one that was doing the towing, which cost eighty some dollars for the job; that he got the parts for the job from the Velie Agency in Baltimore, at the best [fol. 34] price he could get them and that the Sykes Motor Company of Baltimore gave them the best price, because at that time they had about $175,000 outstanding with this Company; that the effect of handling this car in this way was to depreciate its value and that it was not a new car; that the fair market value of the cars, which are the subject of this suit, on the 10th day of January, 1922, they

then being a year old, because new models on all automobiles came out by September 15th, 1922, and these cars had been classified as a year old, they would be a year old if they had stayed on the dealer's floor and never been taken out for demonstration, after a new model comes out which as the usual thing, will drop the price $300.00 to $400.00, and this is a conservative estimate; that there was a change in prices between the dates that these cars were acquired by the National Motor Company, the price having been reduced; that the new models had a different motor, the old models having a Fall motor and the new models had motors manufactured by the Velie Company; that even if the cars had not been used as he stated they had been, by reason of the change of models, they would depreciate $300.00 or $400.00 each being considered a year old; that he had seen Mrs. Lee driving one of the models on three or four occasions, not for demonstration purposes; that they had been depreciated to the extent that it was impossible to dispose of them as new automobiles; that the tires showed it; that an examination of the motor by raising the hood would disclose that the cars had been used; that the cushions were crushed and shiny; that the body had become worn where the door was opened; that they gave evidence of wear. Taking into account all of these matters, that on the 10th day of January, 1922, when the cars were seized, each one of the cars had dropped easily approximately $400.00 in value and that this is a conservative estimate; that it is their practice when they sue for the recovery of an automobile, to put a fair market value on the car so as to obtain as much from the sale as they possibly can, after they are repossessed and that they do not depreciate the value of the cars when they sue for them. Taking into consideration that the car were in the defendant's possession from the 10th of January, 1922, until the 15th of February, 1924, approximately; that they were inspected by Mr. All on December 12, 1923; that the fair [fol. 35] cash market value of these four automobiles on the 12th day of December, 1923, which was about two years after their repossession, based on the ability to purchase any one of these cars at from $350.00 to $400.00, this being a high estimate, they having been on storage during all of

this time at the cost of $6.00 per month or $24.00 per month, for all fours cars, and based on the standard value of automobiles as evidenced by a book published by the National Automobile Used Car Market Report Red Book; that at the time of the second trial of this case on January 15, 1926, these Velie Touring cars were valued at $36.00 a piece, but that on December 12, 1923, when these cars were inspected by Mr. All that they were not worth in excess of $400.00 or $500.00 a piece and that $500.00 for each car would probably be too high a value.

On cross-examination:

He knew that these cars had been in use while in possession of the National Motor Company, Bankrupt, because he had checked them himself; that it is not a custom for automobile dealers to use their new cars, since they have specific instructions from his Company not to use the cars at all; that this man Lee did use these cars but he criticized him for it and he did not do anything about it because Mr. Lee was in a better position, he thought, to dispose of the cars, having the Richmond Agency, than he was; that he did not know what cars Lee had on hand at the time of the bankruptcy; that he was not in a position to state what cars were on sale by Lee when he observed these cars; that he does not know how many cars he had, he was only interested in his Company's cars, each of which showed visible signs of use which would automatically render these cars used cars; that each one of the cars showed sufficient use to be classified as a used car; that for some years the factories have been in the habit of placing on the market the succeeding year's model about the 15th of September of the previous year and now the model for the succeeding year is put on the market in the mid-summer, but he does not know the figures given when the cars were repossessed, this was arranged through Mr. Crowder, who was later killed; the bond he thought was arranged through the [fol. 36] United States Fidelity and Guaranty Company of Baltimore, Maryland, upon which they paid a premium; that with respect to making the bond small in order to make the premium likewise small, the practice is to pick out two or three disinterested persons and let them estimate the valuation; that Mrs. Lee would come down and look out for

things in connection with Mr. Lee's business when he was incapacitated; that she had a regular bookkeeper and stenographer and he assumed that she knew about the prices of the cars from the invoices from the factory.

CHARLES W. CROWDER

Witness testified that he is a practicing attorney in Richmond, Virginia, that he instituted the proceedings in the Law and Equity Court of Richmond for the repossession of the cars by the defendant here; that it was on his advice the cars were repossessed; that W. O. Holmes, the representative of the defendant, made the affidavit for seizure; that he did not feel safe to let the property stay in the possion of Lee; that at that time he knew that Lee's place of business had been shut up, and that Lee had left town.

STIPULATION AS TO CERTAIN FACTS

It is stipulated and agreed as follows:

It is agreed that these cars were yet in the possession of the defendant Finance and Guaranty Company on December 12, 1923, at which time Mr. W. L. All of Messrs. Venable, Baecher and Howard of Baltimore, Maryland, acting for and on behalf of the Trustee, plaintiff herein, and Mr. J. B. Jones, acting for and on behalf of the Finance and Guaranty Company inspected these cars in the City of Baltimore, that is the cars involved in this suit, and it is further stipulated and agreed that said automobiles which are the subject of this suit were disposed of finally by the Finance and Guaranty Company on or about the 15th day of February, 1924, and that demand was made by the Trustee in Bankruptcy for the delivery of the cars to him on the 25th of February, 1922, which demand was refused by the Finance & Guaranty Company.

[fol. 37] MOTION FOR DIRECTED VERDICT

At the close of all the testimony, the defendant moved the Court to render a verdict for the defendant on the ground, as based on the evidence adduced, that the plaintiff is not entitled to recover, but the Court overruled said motion to which ruling of the Court at the time thereof, the defendant excepted.

And the Court certifies that the foregoing is all the evidence introduced on either side, reduced to narrative form.

JUDGMENT

Thereupon the Court rendered its judgment as follows:

"This is the second trial of this case. At the first trial I held that the trustee in bankruptcy was not entitled to recover the cars or their alternate value because it appeared that the cars in question had been purchased by the bankrupt very largely as the result of money furnished by the defendant who had then and there taken a conditional sales contract and had duly recorded the same and thereafter and prior to the filing of the petition in bankruptcy had, by proper legal proceedings in the State Court, repossessed itself of the cars. On appeal the Circuit Court of Appeals had decided, as I interpret the opinion of that Court, that under Section 5224 of the Code of Virginia, 1919, known as the Traders Act, the attempted reservation of the title or conditional sales contract was a nullity and that the attempt to repossess the cars by virtue of that reservation of title or conditional sales contract within four months created a voidable preference which the trustee had a right to have set aside. In deference to the decision of the Circuit Court of Appeals, I am constrained to enter judgment for the trustee in bankruptcy for the value of the property so taken by the defendant and fix the value and the amount for which judgment should be entered at $4,190.99 with interest from December 15, 1922, until paid."

MOTION FOR NEW TRIAL AND ORDER OVERRULING SAME

The defendant by Counsel, moved the Court to set aside its verdict and judgment and grant the defendant a new trial on the ground that the verdict is contrary to the law and the evidence and assign the following grounds for its motion:

[fol. 38] 1st. That the so-called Traders Act which is the foundation rock of this suit, has no application to this case as disclosed by the evidence adduced.

2nd. That the defendant having repossessed under a valid, binding conditional sales contract duly of record, property upon which it had a valid lien and proper reservation of title in it, prior to the filing of the petition, that the rights of the trustee in bankruptcy were fixed as of the day of the filing of the petition and the trustee having no lien at the time of the repossession of the property by the defendant is without any rights in this case.

3rd. That in no event is the trustee entitled to recover since the bankrupt never had any title of any kind to the property sought to be recovered in this suit or any claim thereon.

4th That the judgment rendered by the Court is excessive because the amount of recovery should be the value of the cars as of January 15, 1926, the date upon which this trial was had.

Which motion the Court overruled, to which action of the Court the defendant at the time thereof excepted.

MOTIONS FOR DIRECTED VERDICT

Be it further remembered that upon the trial of this case, it having been stipulated and agreed that the entire matter of law and fact should be submitted to the Court and after all the evidence had been introduced on behalf of the plaintiff, all of which is hereinbefore fully set out and made a part of the record in this case, the defendant, by Counsel, moved the Court to find a verdict for the defendant on the ground that under said evidence the plaintiff was not en-

titled to recover the property which is the subject of this suit, which motion the Court overruled and to which action of the Court the defendant then and there duly excepted.

And be it further remembered that on the trial of this case, upon the stipulation that the entire matter of law and fact should be submitted to the Court, at the completion of all of the evidence in this case, all of which is hereinbefore set out and made a part of the record in this case, the de- [fol. 39] fendant by Counsel moved the Court to find a verdict for the defendant on the ground that under the evidence adduced the plaintiff was not entitled to recover in this action, which motion the Court overruled and to which action of the Court the defendant then and there duly excepted.

MOTION FOR NEW TRIAL.

And be it further remembered that on the trial of this cause as aforesaid, and after the Court had rendered its verdict and judgment herein, all of which is hereinbefore set out and made a part of the record in this case, the defendant moved the Court to set aside its verdict and judgment and grant the defendant a new trial upon the ground that the verdict is contrary to the law and the evidence and assign the following grounds for its motion:

1st. That the so-called Traders Act which is the foundation rock of this suit, has no application to this case as disclosed by the —

2nd. That the defendant having repossessed under a valid, binding conditional sales contract duly of record, property upon which it had a valid lien and proper reservation of title in it, prior to the filing of the petition, that the rights of the trustee in bankruptcy were fixed as of the day of the filing of the petition and the trustee having no lien at the time of the repossession of the property by the defendant is without any rights in this case.

3rd. That in no event is the trustee entitled to recover since the bankrupt never had any title of any kind to the property sought to be recovered in this suit or any claim thereon.

4th. That the judgment rendered by the Court is excessive because the amount of recovery should be the value of the cars as of January 15, 1926, the date upon which this trial was had,

all of which is hereinbefore fully set forth and made a part of the record in this case, which motion the Court overruled and to which action of the Court in rendering and entering judgment against the defendant as aforesaid and in overruling the defendant's motion for a new trial and in denying [fol. 40] ing the defendant's several motions for a directed verdict as herein set forth, to each of them, the defendant, by its Attorney, duly excepted, and now tenders this its Bill of Exceptions which it prays may be signed, sealed and made a part of the record in this case, which is accordingly done.

Given under my hand and seal this 20th day of February, 1926.

D. Lawrence Groner, United States District Judge. (Seal.)

Feb. 20, 1926.

In United States District Court

Exhibit "B" in Evidence

5m-1 28 21 f-B. Co.

Finance & Guaranty Co.

Selling Price: ——. Freight and Charges: ——. Finance Charges: ——. Time Price: ——.

Conditional Sale Agreement

This agreement, made in triplicate at Baltimore, Md., this 28th day of April, 1921, between (Purchaser:) National Motor Co., residing or carrying on business at and whose address is number 1629 W. Broad Street, City of Richmond, County of ——, State of Virginia, hereinafter called Vendee, and (Dealer:) Finance & Guaranty Co., residing or carrying on business at and whose address is Baltimore, Md., hereinafter called Vendor:

Witnesseth: That in consideration of $1, interchangeably paid, receipt whereof is hereby acknowledged, Vendee has agreed to purchase and Vendor has agreed to sell, upon terms and conditions hereinafter set forth, personal property consisting of — (3) Velie Tourings Automobile-, Factory Number- 114857, 114882, 114892, Motor Number- [fol. 41] —, regularly equipped and extra equipment as follows——.

And this agreement further witnesseth:

1. That Vendee has this day obtained from Vendor the said personal property valued at Thirty Seven Hundred, Thirty-one and 06/100 Dollars ($3,731.06) and interest, for and upon which Vendee has paid $932.77, this day and has promised and hereby does promise to pay (in addition to the other payments and other obligations hereinafter promised and provided for) the sum of Twenty-seven Hundred Ninety-eight and 29/100 Dollars ($2,798.29) 10 days after date, each on the — day of each month hereafter.

2. That Vendee concedes, admits and covenants that the title of all said personal property now is and is to remain vested in Vendor, and that no title either legal or equitable, shall vest in Vendee, except as Bailee, until each and every instalment of the said purchase money has been paid, and each and every obligation of Vendee performed, in accordance with the stipulations hereinafter and hereinbefore set forth, when Vendor will deliver to Vendee a proper bill of sale, upon Vendee's request and payment of attorney's fee therefor.

Vendee promises and covenants:

3. That Vendee will punctually pay each and every instalment of the said purchase price to Vendor on the several days and times when the same shall become due; that Vendee will keep said property in first class condition and repair and working order, and will make all repairs to the satisfaction of Vendor, and will bear all risk of loss of said property and of damage thereto from any cause whatsoever, and will return the same, upon failure by Vendee to comply with the terms of this agreement, in as good condition as reasonable and proper use will permit; that

Vendee will not mortgage, rent, p. n, dispose of or sell th· [fol. 42] said property or any part or parts thereof or accessory or accessories thereto, or in any manner part with the possession thereof, or remove the same from the State of Maryland, except during the temporary use without the permission of Vendor first obtained in writing, and Vendee will at any time, when so requested furnish Vendor with a written sworn statement showing the whereabouts and conditions of said property, whether in active service or withdrawn therefrom, and the cause of any such withdrawal, and will exhibit said property, whether in active service or withdrawn therefrom, and the cause of any such withdrawal, and will exhibit said property to Vendor or its agent and will give immediate notice by telephone and by letter, enclosed in a post paid wrapper addressed to Vendor at its address, first hereinabove given and deposited in a United States postoffice station or letter box, of any demand to levy under any legal proceedings or of any writ issued against or laid upon said property, and of any claims whatsoever against or upon said car by any person other than Vendor.

4. That Vendee will, at Vendee's own expense, keep the said property and all of it fully protected for the benefit of Vendor until the purchase price and all claims against Vendee under this contract shall have been paid in full, by policies of insurance covering the hazards of fire, theft, loss and collision, in insurance companies satisfactory to Vendor, and will deliver said policies to Vendor, and that said policy shall be issued to and the loss upon said policies shall be payable to Vendor and Vendee as their respective interests may appear; and the amount received thereon by Vendor shall be applied by it on account of the purchase price of the aforesaid property then remaining unpaid, and Vendee expressly covenants that if Vendee should fail or neglect to furnish Vendor with such policies of insurance at the time Vendee takes possession of the above mentioned property then Vendor, at Vendor's option, may insure the said property as aforesaid for its full value, and the amount paid or incurred by Vendor for the cost of premiums upon such insurance with interest thereon, shall constitute a part of the purchase price of the said property and shall be added thereto as hereinafter provided.

5. That any and all amounts actually paid out or liabil-
[fol. 43] ities incurred by Vendor in connection with (a) any retaking or any attempted retaking of said property, or of any part thereof, whether in an action of replevin or otherwise, or (b) with a sale thereof after such retaking or (c) with defending or asserting or attempting to defend or assert Vendor's title, including (1) all expenses of repairs and repairing for and conducting sale, (2) storage, (3) attorney's fees, expenses and ordinary and necessary disbursements, (4) fees of public officers and officials, (5) taxable costs, (6) expenses and charges of employes, (7) supplies, (8) transportation and (9) and other expenses which may be paid or incurred by Vendor and not expressly enumerated herein, together with cost of insurance as hereinbefore provided, with interest on all thereof, shall constitute a part of the purchase price and of the agreed value of said property, and may be added to the last instalment of such purchase price as hereinabove covenanted to be paid, and Vendor may retain from the proceeds of any sale of above mentioned property the amount due upon this contract which shall include the amount of all expenses as above set forth, and Vendee expressly promises and covenants that if the proceeds of sale should not be sufficient to pay the amount due Vendor, including all such expenses then, upon demand, Vendee personally will pay the deficiency.

It is further understood and agreed that:

6. If default be made in the payment of any of the said sums herein mentioned, as they shall respectively become due (whether evidenced by promissory notes or otherwise) or if Vendee shall attempt to sell, pawn or dispose of, or shall misuse or injure the said property or any part thereof, or in any manner not comply with this agreement, or shall fail to perform or observe any covenant or condition of this agreement whatsoever, or if the said property or any thereof shall be attached, levied upon or in any way subjected to process, then it shall be lawful for said Vendor and the said Vendee hereby authorizes and empowers Vendor and Vendor's attorneys or agents, with or without force or process of law, to enter upon or into any place or places where the

said property or any part thereof is or is reasonably be-
[fol. 44] lieved to be and to take away and repossess the said property without any opposition or molestation by or from Vendee or Vendee's agents or servants whatsoever.

7. If Vendee shall fail to pay any instalment of the purchase price, as and when it shall become due, or if a receiver of Vendee's property shall be appointed, or if a petition in bankruptcy shall be filed by or against Vendee, or if Vendee shall fail to perform any covenant or condition of this agreement herein provided to be performed by said Vendee, or if the said property or any thereof shall be attached, levied upon or in any way subjected to process, then, at the option of the Vendor, the entire purchase price shall forthwith be and become due and payable, notwithstanding any notes which may have been given by Vendee as representing the purchase price or any part thereof shall not by their terms have become due and payable.

8. Any notes which may be given by Vendee as representing the purchase price of the property, or any part thereof, shall not be deemed payments and shall not effect Vendor's title to the property unless the notes are paid in full as they shall respectively mature, and no attempt upon the part of the Vendor to collect upon any such notes, either by legal proceedings or otherwise, shall operate as an election of remedies which will preclude the Vendor on the non payment of any such notes or any judgment obtained thereon from asserting its right to the possession of the said property.

9. Vendee expressly waives any and all requirements of the statutes of the State of Maryland, and of any other State, county or jurisdiction, within which such property may be at any time, during the life of this agreement, (whether now in effect or which may become effective prior to the payment in full by Vendee of the purchase price of the above mentioned property) that in case the said property or any part or parts thereof should be retaken by Vendor or Vendor's successor in interest, it or they should be retained for any period whatever from the time of such retaking and that the Vendor should be required to sell such property or any part or parts thereof

within any limited time after retaking the same, and Vendee [fol. 45] further waives any requirements of any such statutes that the said property should be sold at public auction and as to notice of sale thereof, and Vendee expressly authorizes and consents to a sale of such property as so retaken without notice at private sale, or otherwise, at the option of the Vendor, and without any requirement that such sale should occur at any particular time or at the place where such property should then be located, and Vendee further covenants, consents and agrees that upon any sale of such property Vendor may become the purchaser thereof and shall hold the same thereafter in Vendor's own right and absolutely.

10. Each and every right and remedy herein specifically given to Vendor shall be cumulative, and may be exercised in addition to every other right or remedy herein specifically given, or now or hereafter existing at law or in equity or by statute. In case any of the provisions of this contract should be held invalid, the remaining provisions shall not be effected by such invadility. Each right, privilege or benefit herein conferred and granted or attempted to be conferred and granted upon or to the Vendor is and is intended to be a separate and distinct right, privilege and benefit, and the validity of any one or more of them shall not effect the remainder.

11. No delay or omission of Vendor or of any of the holders of any notes given to evidence any of the payments hereinabove promised to be made, in the exercise of any right or remedy accruing upon default hereunder, or thereunder, shall impair any such right or remedy or shall be construed to be a waiver of such default, or an acquiescence therein, nor shall the acceptance by Vendor or by any of the holders of any of said notes of any security, or of any payment by or on account of the balance of said purchase price, or the principal of any of said notes, be deemed a waiver of any defaults.

12. Any and all notices and demands arising under or having reference to this agreement or to any claims, sales or proceedings hereunder, or under any statute applicable to the subject matter or any part of the subject matter

hereof, shall be sufficient notices and demands and shall be deemed to have been received by and served upon Vendee, when deposited in any post office, station or letter box under [fol. 46] the control of the United States Government, enclosed in a postpaid envelope addressed to Vendee and directed to such Vendee at Vendee's address as first hereinabove given, which is the address of Vendee's place of residence if Vendee is an individual and of its principal place of business if a corporation.

No clause in or stipulation of this agreement shall be deemed rescinded as against Vendor unless such rescission is in writing and signed by Vendor, or by an executive officer of Vendor, if Vendor is a corporation, and each and every right, privilege and benefit herein given to Vendor shall apply, extend to and devolve upon Vendor's successors and assigns.

In testimony whereof, said Vendee and Vendor have caused these presents to be executed the day and year first above written.

National Motor Co., (Purchaser,) by (Signed) W. A. Lee, Mgr. (L. S.) Finance & Guaranty Co., (Dealer,) by (Signature undecipherable,) Treas. (L. S.)

Attest: (Signed) Carrie L. Lee, E. M. Fox, (Two Subscribing Witnesses.)

Exhibit "C" in Evidence

5m-1 28 21-f B. Co.

Finance & Guaranty Co.

Selling Price: ——. Freight and Charges: ——. Finance Charges: ——. Time Price: ——.

[fol. 47] Conditional Sale Agreement

This agreement, made in triplicate at Baltimore, Md., this 6 day of August, 1921, between (Purchaser:) National Motor Co., residing or carrying on business at and whose

address is number 1629 W. Broad St., Street, City of Richmond, County of ——, State of Virginia, hereinafter called Vendee, and (Dealer:) Finance & Guaranty Company, residing or carrying on business at and whose address is Baltimore, Md., hereinafter called Vendor:

Witnesseth: That in consideration of $1, interchangeably paid, receipt whereof is hereby acknowledged, Vendee has agreed to purchase and Vendor has agreed to sell, upon terms and conditions hereinafter set forth, personal property consisting of 3 Velie Tourings

( )

Motor trucks, Model

78197 I serial no. Automobile
Factory Number 115969 " " Motor Number
116036 " "

regularly equipped and extra equipment as follows:
48215 6706 7345

And this agreement further witnesseth:

1. That Vendee has this day obtained from Vendor the said personal property valued at Thirty Six Hundred Forty Seven and 31/100 Dollars ($3,647.31) and interest, for and upon which Vendee has paid $911.83, this day and has promised and hereby does promise to pay (in addition to the other payments and other obligations hereinafter promised and provided for) the sum of Twenty Seven Hundred Thirty-five & 48/100 Dollars ($2,735.48) 10 days after date, each on the — day of each month hereafter, with interest after maturity at 6%.

[fol. 48] 2. That Vendee concedes, admits and covenants that the title of all said personal property now is and is to remain vested in Vendor, and that no title either legal or equitable, shall vest in Vendee, except as Bailee, until each and every instalment of the said purchase money has been paid, and each and every obligation of Vendee performed, in accordance with the stipulations hereinafter and hereinbefore set forth, when Vendor will deliver to Vendee a

proper bill of sale, upon Vendee's request and payment of attorney's fee thereof.

Vendee promises and covenants:

3. That Vendee will punctually pay each and every instalment of the said purchase price to Vendor on the several days and times when the same shall become due; that Vendee will keep said property in first-class condition and repair and working order, and will make all repairs to the satisfaction of Vendor, and will bear all risk of loss of said property and of damage thereto from any cause whatsoever, and will return the same, upon failure by Vendee to comply with the terms of this agreement, in as good condition as reasonable and proper use will permit; that Vendee will not mortgage, rent, pawn, dispose of or sell the said property or any part or parts thereof or accessory or accessories thereto, or in any manner part with the possession thereof, or remove the same from the State of ——, except during the temporary use without the permission of Vendor first obtained in writing, and Vendee will at any time, when so requested furnish Vendor with a written sworn statement showing the whereabouts and conditions of said property, whether in active service or withdrawn therefrom, and the cause of any such withdrawal, and will exhibit said property, whether in active service or withdrawn therefrom, and the cause of any such withdrawal, and will exhibit said property to Vendor or its agent and will give immediate notice by telephone and by letter, enclosed in a post paid wrapper addressed to Vendor at its address, first hereinabove given and deposited in a United States postoffice station or letter box, of any demand to levy under any legal proceedings or of any writ issued against or laid upon said property, and of any claims whatsoever against or upon said car by any person other than Vendor.

[fol. 49] 4. That Vendee will, at Vendee's own expense, keep the said property and all of it fully protected for the benefit of Vendor until the purchase price and all claims against Vendee under this contract shall have been paid in full, by policies of insurance covering the hazards of fire, theft, loss and collision, in insurance companies satisfactory to Vendor, and will deliver said policies to Vendor, and

that said policy shall be issued to and the loss upon said policies shall be payable to Vendor and Vendee as their respective interests may appear; and the amount received thereon by Vendor shall be applied by it on account of the purchase price of the aforesaid property then remaining unpaid, and Vendee expressly covenants that if Vendee should fail or neglect to furnish Vendor with such policies of insurance at the time Vendee takes possession of the above mentioned property, then Vendor, at Vendor's option, may insure the said property as aforesaid for its full value, and the amount paid or incurred by Vendor for the cost of premiums upon such insurance with interest thereon, shall constitute a part of the purchase price of the said property and shall be added thereto as hereinafter provided.

5. That any and all amounts actually paid out or liabilities incurred by Vendor in connection with (a) any retaking or any attempted retaking of said property, or of any part thereof, whether in an action or replevin or otherwise, or (b) with a sale thereof after such retaking or (c) with defending or asserting or attempting to defend or assert Vendor's title, including (1) all expenses of repairs and repairing for and conducting sale, (2) storage, (3) attorney's fees, expenses and ordinary and necessary disbursements, (4) fees of public officers and officials, (5) taxable costs, (6) expenses and charges of employes, (7) supplies (8) transportation and (9) *and* other expenses which may be paid or incurred by Vendor and not expressly enumerated herein, together with cost of insurance as hereinbefore provided, with interest on all thereof, shall constitute a part of the purchase price and of the agreed value of said property, and may be added to the last instalment of such purchase price as hereinabove covenanted to be paid, and Vendor may retain from the proceeds of any sale of above mentioned property the amount due upon this contract [fol. 50] which shall include the amount of all expenses as above set forth, and Vendee expressly promises and covenants that if the proceeds of sale should not be sufficient to pay the amount due Vendor, including all such expenses, then, upon demand, Vendee personally will pay the deficiency with interest.

It is further understood and agreed that:

6. If default be made in the payment of any of the said sums herein mentioned, as they shall respectively become due (whether evidenced by promissory notes or otherwise) or if Vendee shall attempt to sell, pawn or dispose of, or shall misuse or injure the said property or any part thereof, or in any manner not comply with this agreement, or shall fail to perform or observe any covenant or condition of this agreement whatsoever, or if the said property or any thereof shall be attached, levied upon or in any way subjected to process, then it shall be lawful for said Vendor and the said Vendee hereby authorizes and empowers Vendor and Vendor's attorneys or agents, with or without force or process of law, to enter upon or into any place or places where the said property or any part thereof is or is reasonably believed to be and to take away and repossess the said property without any opposition or molestation by or from Vendee or Vendee's agents or servants whatsoever.

7. If Vendee shall fail to pay any instalment of the purchase price, as and when it shall become due, or if a receiver of Vendee's property shall be appointed, or if a petition in bankruptcy shall be filed by or against Vendee, or if Vendee shall fail to perform any covenant or condition of this agreement herein provided to be performed by said Vendee, or if the said property or any thereof shall be attached, levied upon or in any way subjected to process, then at the option of the Vendor, the entire purchase price shall forthwith be and become due and payable, notwithstanding any notes which may have been given by Vendee as representing the purchase price or any part thereof shall not by their terms have become due and payable.

[fol. 51] 8. Any notes which may be given by Vendee as representing the purchase price of the property, or any part thereof, shall not be deemed payments and shall not effect Vendor's title to the property unless the notes are paid in full as they shall respectively mature, and no attempt upon the part of the Vendor to collect upon any such notes, either by legal proceedings or otherwise, shall operate as an election of remedies which will preclude the Vendor on the non payment of any such notes or any judgment obtained

thereon from asserting it- right to the possession of the said property.

9. Vendee expressly waives any and all requirements of the statutes of the State of ——, and of any other State, county or jurisdiction, within which such property may be at any time, during the life of this agreement, (whether now in effect or which may become effective prior to the payment in full by Vendee of the purchase price of the above mentioned property) that in case the said property or any part or parts thereof should be retaken by Vendor or Vendor's successor in interest, it or they should be retained for any period whatever from the time of such retaking and that the Vendor should be required to sell such property or any part or parts thereof within any limited time after retaking the same, and Vendee further waives any requirements of any such statutes that the said property should be sold at public auction and as to notice of sale thereof, and Vendee expressly authorizes and consents to a sale of such property as so retaken, without notice at private sale, or otherwise, at the option of the Vendor, and without any requirement that such sale should occur at any particular time or at the place where such property should then be located and Vendee further covenants, consents and agrees that upon any sale of such property Vendor may become the purchaser thereof and shall hold the same thereafter in Vendor's own right and absolutely.

10. Each and every right and remedy herein specifically given to Vendor shall be cumulative, and may be exercised in addition to every other right or remedy herein specifically given, or now or hereafter existing at law or in equity or by statute. In case any of the provisions of this con- [fol. 52] tract should be held invalid, the remaining provisions shall not be effected by such invalidity. Each right, privilege or benefit herein conferred and granted or attempted to be conferred and granted upon or to the Vendor is and is intended to be a separate and distinct right, privilege and benefit, and the validity of any one or more of them shall not effect the remainder.

11. No delay or omission of Vendor or of any of the holders of any notes given to evidence any of the payments

hereinabove promised to be made, in the exercise of any right or remedy accruing upon default hereunder, or thereunder, shall impair any such right or remedy or shall be construed to be a waiver of such default, or an acquiescence therein, nor shall the acceptance by Vendor or by any of the holders of any of said notes of any security, or of any payment by or on account of the balance of said purchase price, or the principal or interest of any of said notes, be deemed a waiver of any defaults.

12. Any and all notices and demands arising under or having reference to this agreement or to any claims, sales or proceedings hereunder, or under any statute applicable to the subject matter or any part of the subject matter hereof, shall be sufficient notices and demands and shall be deemed to have been received by and served upon Vendee, when deposited in any postoffice, station or letter box under the control of the United States Government, enclosed in a postpaid envelope addressed to Vendee and directed to such Vendee at Vendee's address as first hereinabove given, which is the address of Vendee's place of residence if Vendee is an individual and of its principal place of business if a corporation.

13. No clause in or stipulation of this agreement shall be deemed rescinded as against Vendor unless such rescission is in writing and signed by Vendor, or by an executive officer of Vendor, if Vendor is a corporation, and each and every right, privilege and benefit herein given to Vendor shall apply, extend to and devolve upon Vendor's successors and assigns.

In testimony whereof, said Vendee and Vendor have [fol. 53] cause these presents to be executed the day and year first above written.

National Motor C., (Purchaser,) by (Signed) W. A. Lee, Mgr. (L. S.) Finance & Guaranty Company, (L. S.) Dealer,) by (Signature undecipherable,) Treas.

Attest: (Signed) Carrie L. Lee, Edyth M. Fox, (Two subscribing witnesses.)

In United States District Court

Assignments of Error—Filed February 20, 1926

And the defendant now assigns as error in connection with its petition for writ of error and says that in the record and proceedings and in the final judgment aforesaid manifest error has been committed to the prejudice of the defendant in error, in this, to wit:

1

That the Court erred in denying the defendant's motion to direct a verdict in its favor at the close of the plaintiff's testimony.

2

That the Court erred in denying the defendant's motion to direct a verdict in its favor at the close of all of the testimony.

3

That the Court erred in holding that the so called Traders Act applies to the automobiles which are the subject of this

[fol. 54] 4

That the Court erred in holding that the defendant's title to the automobiles, which are the subject of this suit, was not valid as against the trustee in bankruptcy—the plaintiff herein—and in holding the defendant's reservation of title to said property was invalid.

5

That the Court erred in holding that the plaintiff's rights to the possession of the automobiles which are the subject of this suit, was prior and greater than that of the defendant in that in so holding the Court held that the trustee in bankruptcy's right attached to the property to which the bankrupt never had title.

6

That the Court erred in holding that the repossession by the defendant of its own property under a valid conditional sales contract duly recorded, was a voidable preference as against the trustee in bankruptcy.

7

The Court erred in fixing the value of the automobiles which are the subject of this suit at Four Thousand ($4,000.00) Dollars, because the evidence does not support such valuation and the valuation thereof should have been determined as of the time of the determination of the trustee in bankruptcy's title thereto.

By reason whereof the plaintiff in error prays that the judgment aforesaid may be reversed.

(Signed) S. M. Brandt, Attorney for Defendant in Error.

[fol. 55] In United States District Court

Memoranda of Clerk re Certain Papers

Petition for writ of error filed February 20th, 1926.

Order allowing writ of error and fixing amount of writ of error and supersedeas bond entered and filed Feby. 20, 1926.

Writ of error and supersedeas bond approved and filed Feby. 26, 1926; dated February 25th, 1926; penalty: Six thousand dollars ($6,000.00); obligors: Finance & Guaranty Company and United States Fidelity & Guaranty Company; conditioned to pay all costs.

Writ of error issued February 23rd, 1926.

Citation, dated February 23rd, 1926. Legal service accepted on the 2nd day of March, 1926, by Joseph M. Hurt, Jr., attorney for Defendant in Error.

[fol. 56] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed February 20, 1926

It is hereby stipulated between counsel for the parties to this cause that the record herein shall consist of the following:

1. The pleadings, including the Declaration originally filed as a Bill of Complaint, and exhibits filed therewith, the motion to dismiss, the motion to transfer cause to law side of Court, and all orders entered in this cause.

2. The opinions or memoranda of the Court on the first trial and this trial, and the opinion of the Circuit Court of Appeals reversing the judgment upon the first trial and remanding the case to the District Court.

3. The Defendant's Bill of Exceptions, including the evidence reduced to narrative form.

4. The exhibits filed with the testimony of Wilson R. Payne, consisting of the conditional sales contracts covering the four automobiles claimed by the plaintiff, marked Exhibit "B" and Exhibit "C", omitting the blank assignments thereto attached.

5. The Assignment of Errors, and this stipulation of counsel.

It is further stipulated and agreed that the original papers to be certified by the Clerk of this Court to the United States Circuit Court of Appeals at Richmond, accompanying and as a part of the transcript of record herein are as follows:

(a) Petition for Writ of Error.
(b) Order Granting Writ of Error.
(c) Writ of Error.
(d) Citation with service accepted.

[fols. 57 & 58] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed February 20th, 1926

It is further stipulated and agreed that the Clerk of this Court shall make up a transcript of the record in this cause and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, who shall have the same printed in accordance with Rule 23.

(Signed) S. M. Brandt, Counsel for Plaintiff in Error. Jos. M. Hurt, Jr., Counsel for Defendant in Error.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 59] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 2506

FINANCE AND GUARANTY COMPANY, Plaintiff in Error,

versus

HENRY W. OPPENHIMER, Trustee in Bankruptcy for W. A. Lee, Trading as National Motor Company, Bankrupt, Defendant in Error

Error to the District Court of the United States for the Eastern District of Virginia, at Richmond

MINUTE ENTRIES

March 29, 1926, the transcript of record is filed and the case docketed.

Same day, the original petition for writ of error, order allowing writ of error, writ of error, writ of error bond, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of S. M. Brandt is entered for the plaintiff in error.

April 1, 1926, the appearance of Joseph M. Hurt, Jr., is entered for the defendant in error.

April 16, 1926, twenty-five copies of the printed record are filed.

April 27, 1926, petition of defendant in error to continue case to the October term, 1926, is filed.

April 27, 1926 (April term, 1926), cause is continued in open Court, to the October term, 1926.

[fol. 60] In United States Circuit Court of Appeals

Argument and Submission

October 21, 1926 (October term, 1926), cause came on to be heard before Waddill, Rose and Parker, Circuit Judges, and is argued by counsel and submitted.

In United States Circuit Court of Appeals, Fourth Circuit

No. 2506

[Title omitted]

In Bankruptcy

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond

(Argued October 21, 1926. Decided October 30, 1926)

Before Waddill, Rose, and Parker, Circuit Judges

S. M. Brandt for Plaintiff in Error and Joseph M. Hurt, Jr., for defendant in error.

Opinion—Filed October 30, 1926

[fol. 61] Per Curiam:

This case has been before us twice. What we had to say about it at its first presentation will be found in 5 F. (2d)

486. When in pursuance to our mandate, it was again tried below a jury trial was waived in writing. The learned District Judge was thus made the trier of the facts and he found that the value of the property converted by the appellant was $4,190.99. There was sufficient evidence to support this conclusion and its accuracy is not reviewable here.

On the fundamental question as to the relative rights of the trustee and the appellant the case made at the second trial did not differ from the one upon which we had already passed. None of the exceptional circumstances which sometimes justify a departure from the rule of the law of the case are found here.

Affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

[Title omitted]

JUDGMENT—Filed November 1, 1926

[fol. 62] This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

November 1, 1926.

John C. Rose, U. S. Circuit Judge.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed November 30, 1926

Upon the application of the plaintiff in error, by S. M. Brandt, Esq., its attorney, and for good cause shown,

It is ordered, that the mandate of this Court in the above case be, and the same is hereby, stayed pending the appli-

cation of the plaintiff in error in the Supreme Court of the United States for a writ of certiorari to this Court, provided said application is presented in the said Supreme Court within 45 days from this date.

Edmund Waddill, Jr., Senior Circuit Judge.

November 30, 1926.

[fol. 63] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 64] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 7, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.